PUBLIC PROSECUTOR

v.

LIM MUNG SHAING

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA THAMBY CHIK J
[CRIMINAL TRIAL NO. 24 OF 1985]
11 APRIL 1989

CRIMINAL PROCEDURE: *Dangerous Drugs - Trafficking in a controlled drug - Conflicting statements made by prosecution witnesses - Creditibility impeached - Whether the search list amounted to a confession once the accused signed it - Admissibility of the search list - Continuous chain of evidence.*

The accused was charged with the offence of trafficking 19,374.31 grammes of heroin contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952. The drug was found by the custom officers in the hall of a house. At the material time 2 vehicles were also recovered.

During the trial, PW1 testified that he only recovered one car. At this point, the defence Counsel applied to impeach the credit of PW1 by introducing a police report made by PW1 and exhibited as D7. In Exhibit D7, PW1 stated, "... dan juga tahan 2 buah kereta...". PW1 admitted making the police report but denied making the statement. In answer to the 2 conflicting versions of his statements, he explained that he forgot about it as it had happened 4 years ago. However, subsequently, he said he did not deny what was stated in the report (D7). There were also material contradictions in the evidence given by PW1 with those given by PW3 & PW4.

Defence Counsel had also objected to the admissibility of the search list (Exhibit P6) as it contained incriminating material against the accused. In this case, the search list listed out 29 incriminating items and was prepared by PW1 some hours after the accused had been arrested and in custody. The accused was asked to sign, he did. The signature of PW1 also appeared in the said search list. Here, the defence Counsel argued that "whichever way one looks at this document, the signature of the accused on the document is tantamount to a confession by the accused that he was in possession of the material in question. However, the learned DPP submitted that the signature of the accused is only to indicate acknowledgement of receipt of the search list.

Held:

[1] PW1's credit stood to be assessed as a whole with the rest of the evidence for the prosecution (See *Datuk Mokhtar Hashim v. PP*) because of the material discrepancies of PW1's testimony in Court with the testimony of other prosecution witnesses, namely PW3 and PW4. Therefore PW1's credit stood impeached and the whole of his evidence was disregarded.

[2] The search list became a written statement, amounted to a confession once the accused put his signature on it. If it was meant to be the receipt of the Exhibit P6 itself, it could be acknowledged by some other clear means, surely not by putting the accused's name and signature on the Exhibit P6 itself. Accordingly, as no caution was administered by PW1 to the accused before he signed the search list, (Exhibit P6), the document is inadmissible in evidence.

[3] The prosecution failed to establish a continuous chain of evidence relating to the exhibits. Although the law is clear in that "it is unnecessary to call evidence to ensure there is no break in the chain of evidence but where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case" per Abdul Hamid CJ (Malaya) in *Teoh Hoe Chye v. PP*. In this case, there is doubt not only to the identity of the tenant in whose house the drugs were found but also there is doubt as to the identity of the drugs themselves which were sent to the chemist.

[Accused acquitted & discharged without calling for his defence.]

Cases referred to:
Datuk Mokhtar Hashim v. PP [1983] CLJ (Rep) 101
Sia Soon Suan v. PP [1966] 1 MLJ 116
Ah Ping v. PP [1980] 1 MLJ 76
Teoh Hoe Chye v. PP [1987] CLJ (Rep) 386

Legislation referred to:
Criminal Procedure Code, ss. 64, 65, 113
Dangerous Drugs Act 1952, ss. 37A, 39B(1)(a), (2)
Evidence Act 1950, s. 114illus.(g)

For the prosecution - Hafilah bt. Daud, DPP (with Siti Zainab bt. Omar)
For the accused - Manjeet Singh Dhillon; M/s. Lawrence Dhillon & Associates

JUDGMENT

Faiza Thamby Chik J:

In this case, the accused was charged with the offence of trafficking 19,374.31 grammes of heroin contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1962. If found guilty, the death penalty is mandatory under s. 39B(2) of the same Act.

In this case, the dangerous drug was found by the customs officers in the hall of a house No. 5, Jalan Chiew Yoke, off Jalan Seavoy, Setapak, in the City of Kuala Lumpur.

However, upon the evidence adduced in Court, I find that the prosecution evidence falls short of a *prima facie* case at the end of the prosecution case.

During the trial, Senior Superintendent of Customs Ali bin Baba (PW1) testified that he only recovered one car - the Alfa Sud - and he was continuously emphatic about this. At this point, Mr. Manjeet Singh Dhillon, Counsel for the accused, applied to impeach the credit of PW1 by introducing Setapak Police Report No. 5975/84 (D7) made by PW1. The defence called Sergeant 52020 Abdul Aziz Haji Osman (PW2) to formally prove the said document (D7). In Exhibit D7, PW1 stated that "Dan juga tahan 2 buah kereta nombor pendaftaran WAC 7705, JBC 6978..."

PW1 admitted that he made the police report (Exhibit D7) but denied making the said statement. The two conflicting versions were carefully explained to PW1: and in answer to the question put forward by defence Counsel as to why in Court he said that he seized one car only whereas in his police report (D7) he said that he seized two cars, he explained that he forgot about it as it had happened four years ago. He further said that he did not deny what was stated in the report (D7).

I then ruled that following the case of *Datuk Mokhtar Hashim v. PP* [1983] CLJ (Rep) 101, PW1's credit stood to be assessed as a whole with the rest of the evidence for the prosecution.

There were also material contradictions in the evidence given by PW1 with those given by other prosecution witnesses, DSP Balbir Singh (PW3) and DSP Aaron Abraham (PW4), the investigating officer.

In his testimony, PW1 said that on reaching the House No. 5, Jalan Chiew Yoke, he found the main gate locked. He said that he therefore instructed ASP Khalid bin Abu Bakar to climb over the gate followed by Othman Andalan and PW3 and himself. But PW3 said in-chief that on finding the main gate locked, he rattled it but did not shout. He said that this was done in order to attract the attention of the occupants of the house. Then, PW3 said that an Indian man called Muniandy came to the main gate.

In his testimony, PW1 said that he ordered Othman Andalan to break open the back-door of the house, but PW3 said in examination in-chief that he saw ASP Khalid broke the back-door of the house. And under cross-examination, PW3 said that he saw ASP Khalid broke the back-door of the house by the window through the air-well.

In his testimony, PW1 said that on entering the hall he was followed by PW3 and found that there was a settee and a dining table there. Whereas PW3 in examination in-chief said that on entering the house, he saw PW1 and another man was already in the hall.

In his testimony, PW1 said that he conducted a search in all the rooms in the house assisted by Othman Andalan, but PW3 said in examination in-chief that PW1 was accompanied by the accused when he searched all the rooms in the house.

In his testimony, under cross-examination PW1 was repeatedly emphatic that there was only one car seized, i.e. Alfa Sud WAC 7705. He emphasised that not only there were no Honda Accord and Isuzu Trooper seized but also there were no Honda Accord and Isuzu Trooper at the scene of the incident. Whereas PW4, the investigating officer of the case, said under cross-examination that it was incorrect to say that PW1 never handed to him the Isuzu Trooper because he said that he was not mistaken at all about this as he did search the Isuzu Trooper.

Accordingly, I am not taking into account the evidence of PW1 because of the material discrepancies of his testimony in Court with the testimony of other prosecution witnesses, namely, PW3 and PW4. Therefore, at the end of the prosecution case, PW1'S credit stood impeached and I would have to disregard the whole of his evidence. In the circumstances, I must discount and wholly disregard all his evidence in view of a material discrepancy in his evidence in Court and his statement to the police (D7).

Before I proceed further, it would perhaps be apposite for me to mention here about the search list (Exhibit P6).

On the first day of the trial, i.e. on 3 April 1989, while under cross-examining PW1, the learned defence Counsel objected to the admissibility of the search list (Exhibit P6) as it contained incriminating material against the accused. The learned defence Counsel promised to address the Court the next day on this point on the authority of a High Court decision by Datuk Mahadev Shanker J.

On 4 April 1989, the learned defence Counsel, Mr. Manjeet Singh Dhillon, addressed the Court on the issue of the search list (Exhibit P6). He produced the case of *Pendakwa Raya lwn. Rafudin bin Abd. Rafar,* Wilayah Persekutuan Perbicaraan Jenayah Bil. 30/85 (unreported) and read to me paras. 38 to 39 and paras. 41 to 44 from the said case, and he therefore urged the Court to exclude Exhibit P6. In gist, what the paragraphs stated was "whichever way one looks at this document, the signature of the accused on the document, the signature

of the accused on the document is tantamount to a confession by the accused that he was in possession of the material in question". Mahadev Shanker J in *Pendakwa Raya lwn. Rafudin bin Abd. Rafar* Wilayah Persekutuan Perbicaraan Jenayah Bil. 30/85, at p. 20.

On ss. 64 and 65 of the Criminal Procedure Code, the learned Counsel said that those sections have been overtaken by the amendment to s. 113 of the Criminal Procedure Code.

The learned DPP, Cik Siti Zainab bt. Omar, who that morning informed me that she was assisting Cik Hajilah bt. Daud, submitted that ss. 64 and 65 of the Criminal Procedure Code were there to safeguard the accused.

At the end of the submissions, I told both of them that I would give my ruling later. However, because of its importance, I have decided to give my ruling on the issue of the search list (Exhibit P6) on 5 April 1989, but the trial had to be postponed because the learned DPP Cik Hafilah bt. Daud was suddenly taken ill. Again the trial was postponed on 6 and 7 April 1989 because the learned DPP was still on sick leave. On 10 April 1989, I gave my ruling on the issue of the search list (Exhibit P6) in this case.

Firstly, I do not think ss. 64 and 65 of the Criminal Procedure Code apply in this case because those sections referred to a search list made under Chapter VI of the Criminal Procedure Code. Whereas in this case, the search list (Exhibit P6) was made in consequence of a raid - a joint customs/police raid headed by PW1.

In this case, the search list (Exhibit P6) was prepared by PW1 some hours after the accused had been arrested. And at the time, the accused was in custody. And the accused put down his signature on the original search list (Exhibit P6). The signature of Ali bin Baba (PW1), the officer who conducted the search, also appeared in the said list (Exhibit P6).

The search list (Exhibit P6) listed out 29 incriminating items which was said to have been recovered from House No. 5, Jalan Chiew Yoke, off Jalan Seavoy, Setapak - the subject-matter of this case. In point of fact, item 1 states: "2 kotak besar mengandongi 25 bungkusan disyaki heroin didalam tiap satu kotak berjumlah 50 bungkusan. (A1 dan B1)". This crucial statement is clearly prejudicial because manifestly the very charge against the accused in this trial stems from the said "2 kotak besar".

Therefore, this document with the accused's signature on it is tantamount to a confession by the accused and could be construed as implicating him in a material particular as it could be inferred that he was in possession of the offending items in question. This is in direct contravention of s. 37A of the Dangerous Drugs Act 1952.

In his testimony, Senior Superintendent to Customs, Ali bin Baba (PW1) said under cross-examination "The copy of (search) list was given to accused at about 4 p.m. Yes, at that time, the accused was being arrested and hand-cuffed. Before giving him the list, I showed him all items seized. Then I did not do anything else, but gave him the list and then the accused signed it." Therefore it becomes apparent here that instead of giving the accused a copy of the search list and asked him to acknowledge receipt, PW1 gave the accused the very search list itself (Exhibit P6) and asked him to sign it; as the learned DPP put it, to indicate acknowledgement of receipt of the search list (Exhibit P6). By any stretch of the imagination, I could not see how this was so except to say that the search list became a written statement which amounted to a confession once the accused put down his signature on it.

Accordingly, as no caution was administered by PW1 to the accused before he signed the search list (Exhibit P6), I therefore ruled that this document is inadmissible in evidence.

It might be argued that the signature of the accused was by way of acknowledgement of receipt of the search list (Exhibit P6). But in this case this fact was not clear. Exhibit P6 states: "Acknowledgement of receipt by occupant". These words are equivocal. It could be argued that "receipt" of what "by occupant"? Surely, if it was meant to be the receipt of the Exhibit P6 itself, it could be acknowledged by some other clear means; surely not by putting the accused's name and signature on the Exhibit P6 itself. Because by doing so, the search list (Exhibit P6) became a written statement by the accused that the offending items were found in his possession. And as I stated above, Exhibit P6 with the accused's signature on it amounts to a confession by the accused that he was in possession of the non-innocent items in question.

Coming back to the main stream of the evidence in this trial, the prosecution failed to establish a continuous chain of evidence relating to the exhibits especially the two cardboard boxes, the subject-matter of the charge. DSP Aaron Abraham (PW4), the investigating officer of the case, said that he received all the exhibits as per search list (Exhibit P6). But I had already ruled that the search list (Exhibit P6) was inadmissible in evidence. PW4 stated that he saw PW1 marked the blocks of drugs in plastic in the two cardboard boxes and labelled them as P4A (1-25) and P5A (1-25); and when the representative samples were returned by the chemist, both the packets were marked and labelled as P17A (1-25) and P17B (1-25). But the government chemist, Mr. Kee Sue Sing, in his chemist report (P22) stated that when he received the said boxes from PW4 and examined them, the blocks of drugs in plastic were marked as A2 to A26 and B2 to B26.

Therefore due to the shoddy manner the exhibits were handed over from PW1 to PW4 who in turn handed them to the chemist, there was a real possibility that different exhibits were sent to the chemist. I am reinforced in my belief by the fact that no evidence was adduced in Court as to whether these boxes were ever sealed when they were sent or received from the chemist. Another factor is that PW4 admitted under cross-examination that the blocks of drugs in plastic (P4A (1-25) and P5A (1-25)) did not have sharp corners as those found in Exhibit P3C. This fact was confirmed by another prosecution witness, Abd. Wahit bin Husin (PW9) who, under cross examination, unhesitatingly agreed with the defence Counsel that those blocks of drugs in plastic in P4A (9, 10 and 23) and P5A (9, 19, 22 and 25) were not the same as those shown in Exhibit P3C. PW9 further said under cross-examination that he remembered the wrappings in plastic of the blocks of drugs well because this was his first drug case.

Again, there was no proper handing over of the exhibits. This fact was borne out by senior customs officer, Gopala Krishnan (PW7), who said that when he recovered the 28 keys in a plastic bag from the glove compartment of the Alfa Sud, he handed them over to the investigating officer of the case (PW4), but he was not sure whether he got an acknowledgement because he said that at that time it was not the practice in the Customs Department to get an acknowledgement.

PW7 said in-chief that when he searched the accused, he found that he had a bunch of five keys (P21) on his person which could be used to open, among other places in the house, the padlock of the main gate. He further stated that he also found a bunch of five keys on the person of the caretaker of the house whom he called Muniandy. And this bunch of five keys from Muniandy could be used also to open, among other places in the house, the padlock of the main gate.

Whereas Mr. Thakurdas (PW8), the owner of the premises, said under cross-examination that the keys he physically gave to a lady whom he called Ruby was a big clumsy set, divided into two sub-rings - one for the main entrance and gate, and the rest for the rooms in the

house. And this clumsy bunch of keys he further stated with certainty under cross-examination that it consisted more than five keys. PW8 further said that he only gave Ruby one set of keys without any spares as he had none. In any event, PW8 never identified the set of keys (P21) which was recovered from the accused.

PW7 said that he handed over in all 46 keys including those he recovered from the glove compartment of the Alfa Sud to the investigating officer.

In the light of the cavalier manner in which these keys were handled and handed over to the investigating officer, DSP Aaron Abraham, who under cross-examination admitted that as a police officer he agreed with Counsel that there must be a handing over list, it became more noticeable and pertinent when the 28 keys in a plastic bag recovered from the glove compartment of the Alfa Sud were never tested and never tendered as exhibits.

The owner of the Alfa Sud and the caretaker by the name of Muniandy should have been called to explain the gaps in the prosecution evidence as to the keys recovered; and as they were not called, the Court could not be sure and should not indulge in conjectures and possibilities.

As Ong Hock Tai, Ag. CJ (as he then was), said in *Sia Soon Suan v. PP* [1966] 1 MLJ 116:

> Nevertheless, the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this Court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else.

Now, I come to the testimony of Mr. Thakurdas (PW8) who was the owner of the House No. 5. Jalan Chiew Yoke, on 1 October 1984. He said in examination in-chief that the house was tenanted to one Lim Mung Shaing, but he could not identify this man as it happened five years ago. And he further stated that moreover he had met this man in the company of two or three persons then. He said that although an agreement was drawn up, it was never executed. PW8 said that he physically gave a set of keys of the house to the lady of the group who was called Ruby. In his testimony, PW8 said that Ruby was the person who did the talking and negotiation with him. And she was also the person who paid him the RM13,000 being rent and security and utility deposits. The prosecution never called this lady called Ruby to testify. Accordingly, I draw an adverse inference against the prosecution on this score under s. 114(g) of the Evidence Act 1950.

PW8 was an independent witness and his evidence was crucial. PW8 said that he could not identify the tenant of the house nor could he identify the set of keys which he gave to the lady called Ruby.

In the light of the several aspects of the evidence given by the prosecution witnesses in the circumstances I have denoted, I am of the opinion that their individual and combined testimony has raised a real doubt in my mind. There is doubt as to the identity of the tenant of the House No. 5, Jalan Chiew Yoke, as well to the identity of the blocks of drugs in plastic (Exhibit P4A (1-25) and P5A (1-25)) sent to the chemist.

"We would observe at this point that the law is clear in that "it is unnecessary to call evidence to ensure there is no break in the chain of evidence". (See *Ah Ping v. PP* [1980] 1 MLJ 76). But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case." Per Abdul Hamid CJ Malaya (as he then was) in *Teoh Hoe Chye v. PP* [1987] CLJ (Rep) 386).

In this case, there is doubt not only to the identity of the tenant in whose house the drugs were found but also there is doubt as to the identity of the drugs themselves (Exhibit P4A (1-25) and P5A (1-25)). And as stated earlier, "a failure to adduce evidence to prove the necessary link in the chain of evidence would be fatal to the prosecution case". In the instant case, there was such a failure.

Accordingly, I found the accused not guilty of the charge.

I therefore acquitted and discharged him without calling for his defence.

Also found at [1989] 2 CLJ 475